UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BUILD-A-BEAR WORKSHOP, INC., Build-A-Bear, vs. KELLY TOYS HOLDINGS, LLC; et al., Defendants.	Case No. 4:24-cv-00211-MTS Hon. Matthew T. Schelp

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY RELATING TO THE PENDING MOTIONS TO ENJOIN (ECF 11) AND DISMISS (ECF 18)

Defendants Kelly Toys Holdings, LLC, et al. (together, "Kelly Toys") hereby provide notice that the district court in *Kelly Toys Holdings, LLC v. Build-A-Bear Workshop, Inc.*, No. 2:24-cv-1169 (C.D. Cal.) (the "California Case") denied Plaintiff Build-A-Bear Workshop, Inc.'s ("Build-A-Bear") motion to dismiss the California Case. (See Exhibit A, attached hereto.) Specifically, Judge Staton rejected all of Build-A-Bear's arguments for dismissal, holding that:

(1) Kelly Toys's trade dress definition is "sufficient at the pleading stage to put Build-A-Bear on notice of the 'total image, design, and appearance' that Kelly Toys contends is a protectible trade dress" and thus "Kelly Toys has adequately described its asserted trade dress" (*id.* at 8, 11);

(2) Dismissal for the alleged lack of a consistent overall look is "inapt" because, among other reasons, "Kelly Toys has alleged several instances of consumers associating the overall look and feel of Skoosherz [Build-A-Bear's infringing products] with Kelly Toys' Squishmallows line" (*id.* at 13);

(3) "Kelly Toys has plausibly pleaded secondary meaning" and that its trade dress is not "generic" because, among other things, "Kelly Toys has pleaded that consumers

associate its asserted trade dress with Squishmallows" (*id.* at 14-15); and

(4) "Kelly Toys has plausibly pleaded a copyright-infringement claim" because there are sufficient "similarities" between Kelly Toys' copyrighted products and Build-A-Bear's infringing products that dismissal at the pleading stage is inappropriate. (*Id.* at 15-17.)

The California Case has thus now progressed past the pleading stage into discovery.

Judge Staton's denial of Build-A-Bear's motion to dismiss is relevant to Build-A-Bear's argument in its Motion to Enjoin the California Case that "the later-filed California Lawsuit has not progressed any farther than this case." (ECF 30 at 4.) Build-A-Bear made the same argument in opposing Kelly Toys' Motion to Dismiss. (ECF 31 at 5 ("Nor has the later-filed California Lawsuit even progressed any farther than this one, much less than by two years.").)

As Kelly Toys argued in its motion to dismiss in this case, "[i]f the parties proceed here, [Kelly Toys] would need to file their claims as *counterclaims*, and then, as Build-A-Bear's counsel admitted, it would file the *same* motion to dismiss here as it will have done weeks or even months earlier in California." (ECF 34 at 9 n.4 (emphases in original).)[1] That argument has even more force now, as the California Case is proceeding to discovery while the deadline for Kelly Toys to even *file* its counterclaims here has not been set. Proceeding here would not fulfill the purpose of the Declaratory Judgment Act, which is "to obtain early adjudication" for the alleged infringer. *Midwestern Indem. Co. v. H&L Assocs. of Kansas City, LLC*, No. 12-01315-CV-W-BP, 2013 WL 12142651, at *3 (W.D. Mo. Jan. 22, 2013).

[1] To be clear, Build-A-Bear's motion would improperly relitigate the same issues already decided in (and fail for the same reasons as in) the California Case.

Dated: July 16, 2024

Respectfully submitted,

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